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Washington, DC 20529



U.S. Citizenship
and Immigration
Services

FILE:

Office: DENVER, COLORADO

Date:

JUL 22 2004

IN RE:

Petitioner:

Beneficiary:


PETITION:

Petition to Classify Orphan as an Immediate Relative Pursuant to Section 101(b)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(F)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The District Director of the Citizenship and Immigration Services Denver, Colorado District Office denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the Petition to Classify Orphan as an Immediate Relative (Form I-600) on May 15, 2003. The petitioner is a 42-year-old unmarried citizen of the United States. The beneficiary is 8 years old at the present time and was born in Henan Province, People's Republic of China, on February 8, 1996.

The district director denied the petition because the petitioner failed to establish that the beneficiary qualifies as an orphan under the Immigration and Nationality Act because of the death or disappearance of, abandonment or desertion by, or separation or loss from his biological parents.

The petitioner, through counsel, submits a timely appeal.

Section 101(b)(1)(F)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(b)(1)(F)(i), defines orphan in pertinent part as:

a child, under the age of sixteen at the time a petition is filed in his behalf to accord a classification as an immediate relative under section 201(b), who is an orphan because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption; who has been adopted abroad by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who personally saw and observed the child prior to or during the adoption proceedings; or who is coming to the United States for adoption by a United States citizen and spouse jointly, or by an unmarried United States citizen at least twenty-five years of age, who have or has complied with the preadoption requirements, if any, of the child's proposed residence

Further, the regulation at 8 C.F.R. § 204.3(b) provides the following definitions:

Abandonment by both parents means that the parents have willfully forsaken all parental rights, obligations, and claims to the child, as well as all control over and possession of the child, without intending to transfer, or without transferring, these rights to any specific person(s). Abandonment must include not only the intention to surrender all parental rights, obligations, and claims to the child, and control over and possession of the child, but also the actual act of surrendering such rights, obligations, claims, control, and possession. A relinquishment or release by the parents to the prospective adoptive parents or for a specific adoption does not constitute abandonment. Similarly, the relinquishment or release of the child by the parents to a third party for custodial care in anticipation of, or preparation for, adoption does not constitute abandonment unless the third party (such as a governmental agency, a court of competent jurisdiction, an adoption agency, or an orphanage) is authorized under the child welfare laws of the foreign-sending country to act in such a capacity. A child who is placed temporarily in an orphanage shall not be considered to be abandoned if the parents express an intention to retrieve the child, are contributing or attempting to contribute

to the support of the child, or otherwise exhibit ongoing parental interest in the child. A child who has been given unconditionally to an orphanage shall be considered to be abandoned.

Desertion by both parents means that both parents have unaccountably or inexplicably passed out of the child's life, their whereabouts are unknown, there is no reasonable hope of their reappearance, and there has been a reasonable effort to locate them as determined by a competent authority in accordance with the laws of the foreign-sending country.

Loss from both parents means the involuntary severance or detachment of the child from the parents in a permanent manner such as that caused by a natural disaster, civil unrest, or other calamitous event beyond the control of the parents, as verified by a competent authority in accordance with the laws of the foreign sending country.

Separation from both parents means the involuntary severance of the child from his or her parents by action of a competent authority for good cause and in accordance with the laws of the foreign-sending country. The parents must have been properly notified and granted the opportunity to contest such action. The termination of all parental rights must be permanent and unconditional.

According to the facts in the record, the beneficiary is the petitioner's nephew. The record contains the notarial certificate evidencing the beneficiary's birth to [REDACTED]. There is no evidence to demonstrate that the beneficiary's parents were married.

The record reflects that on March 23, 1999, the beneficiary's father began serving a fourteen-year sentence due to his conviction for the crimes of acceptance of bribes and embezzlement of public funds. After his father's incarceration, the beneficiary resided with [REDACTED] distant relatives of the beneficiary's father's foster parents, until adopted by the petitioner on March 21, 2003.

In a declaration also dated March 21, 2003, the beneficiary's biological father states:

I, [REDACTED] request that my son, [REDACTED] born February 8, 1996, be adopted by my biological sister [REDACTED].

* * *

I am requesting to have [REDACTED] declared by the government of China to be the only legal parent of the child and to have full, permanent, legal custody of him. I completely and irrevocably release the child for adoption and emigration, if the adopting parent is none other than my blood sister [REDACTED].

In his denial, the district director noted that because the beneficiary's father released custody of the beneficiary directly to the petitioner, the beneficiary could not be considered abandoned.

On appeal, counsel acknowledges that the beneficiary's father's relinquishment of parental rights to the petitioner is not considered abandonment as defined by the regulations. However, counsel argues the director failed to consider whether any of the other regulatory definitions were applicable to this case. Counsel bases her argument on the fact that the beneficiary's mother has "disappeared." Counsel further argues that the

father's relinquishment of all parental obligations demonstrates that he has willfully forsaken his child and refused to carry out his parental rights and obligations and, thus, has deserted the beneficiary.

Counsel's arguments fail for several reasons. First, while we do not dispute the evidence contained in the record that the biological mother cannot be located, and that the biological father has relinquished his parental rights, such evidence does not meet the definitions of "disappearance" or "desertion" in the regulations. The regulations contemplate the disappearance of *both* parents or desertion by *both* parents. Clearly, the beneficiary's father cannot be considered to have disappeared, as his exact whereabouts are known. Similarly, the fact that the beneficiary's mother has disappeared does not mean that she has willfully forsaken her rights and obligations. There has been no finding by a competent authority that the beneficiary's mother's rights as a parent have been terminated through loss, disappearance or separation.

Moreover, the definition of "desertion by both parents" includes language indicating that the beneficiary has become a ward of a competent authority as a result of the parents' refusal to carry out their rights. We are not persuaded by counsel's argument that the beneficiary should be considered a "constructive" ward of the state because the petitioner and the beneficiary live in separate countries and the beneficiary resides in a "boarding house." The evidence in the record reflects that the beneficiary is in the legal custody of the petitioner, not of a court or governmental agency. Further we take issue with counsel's characterization of the beneficiary's living arrangements as a "boarding house." The home study indicates that when the petitioner began the adoption process she was able to place the beneficiary in "a good boarding school where he lives during the week . . . [o]n the weekends or holidays, [the beneficiary] goes to [the petitioner's] sister in Anyang."

The facts, as evidenced by the statements and documents in the record, do not establish the desertion or disappearance by both parents as those terms are defined in the regulations.

In the alternative, counsel argues that the district director failed to consider the definition of a "sole parent." Counsel argues that the beneficiary was born out of wedlock in China and that there has never been any marriage certificate submitted by the petitioner to show a marriage between the beneficiary's natural parents. Counsel cites State Department Cable No. 96-State-2500 and claims that CIS did not afford the petitioner the opportunity to determine whether the beneficiary had ever been legitimated. Counsel argues that the mother should be considered a sole parent and claims the record supports the fact that the mother is incapable of providing proper care and the father has irrevocably released the beneficiary.

We do not agree. The regulation at 8 C.F.R. § 204.3(b) provides the following definition:

Sole parent means the mother when it is established that the child is illegitimate and has not acquired a parent within the meaning of section 101(b)(2) of the Act. An illegitimate child shall be considered to have a sole parent if his or her father has severed all parental ties, rights, duties, and obligations to the child, or if his or her father has, in writing, irrevocably released the child for emigration and adoption. This definition is not applicable to children born in countries which make no distinction between a child born in or out of wedlock, since all such children are considered to be legitimate. In all cases, a sole parent must be incapable of providing proper care as that term is defined in this section.

As recognized by the Board of Immigration Appeals in *Matter of Wong*, 16 I&N Dec. 646 (BIA 1978), the country of China does not distinguish between children born in wedlock and children born out of wedlock. In *Matter of Wong*, the BIA determined that under the provisions of Article 15 of the Marriage Law of the

People's Republic of China, all children born in China are legitimate from birth. As the beneficiary's birth certificate clearly lists [REDACTED] as his natural father, the beneficiary is not considered illegitimate and the above definition of "sole parent" does not apply to this case.

In visa petition proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden; the petitioner has not established that the beneficiary is eligible for classification as an orphan pursuant to section 101(b)(1)(F) of the Immigration and Nationality Act, 8 U.S.C. 1101(b)(1)(F).

ORDER: The appeal is dismissed.